F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

September 27, 1938.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) &

GORDON-SMITH, Ag. J.A.

July 14, 1939.

DHARMARATNA vs. DHARMARATNA.

[PAHANG CIVIL APPEAL No. 2 of 1938]

Trusts — Purchase of land — purchase money provided by another—resulting trust—presumption—rebuttal.

The respondent lived with the appellant as his mistress from 1921 until 1935 and bore him several children. In 1931 she became the registered proprietor of 2 pieces of land the purchase consideration being provided by the appellant. In the same year she gave the appellant a power of attorney which gave to the appellant authority to sell the lands in question. Differences arose in 1935 and the power was revoked. Upon a settlement being reached between the parties, the respondent gave to appellant a further power of attorney expressed to be irrevocable. Acting under the latter power of attorney the appellant executed a transfer to himself of the 2 pieces of land. The respondent filed a suit claiming a declaration that the lands were her absolute property and that the transfer in favour of the appellant was null and void. The trial Judge, Terrell, Ag. C.J., gave judgment for the respondent.

Held, on appeal to the Court of Appeal, that the presumption of a resulting trust in favour of the appellant was rebutted by evidence showing that the appellant had intended to benefit the respondent by the transfer of the lands to her in her name.

TRIAL OF SUIT.

Ramani for the plaintiff.

Sharma for the defendant.

The facts are sufficiently related in the judgment below.

Cur Adv. Vult.

Terrell Ag. C. J.—The plaintiff and the defendant are Sinhalese, but have lived for many years in the Federated Malay States. The plaintiff lived with the defendant as his mistress from 1921 until 1935, and bore him several children, of whom five are living. The defendant was not in a position to marry the plaintiff as he had a wife and children in Ceylon, and his wife was still alive.

In 1929 the defendant purchased a small piece of land and had the transfer made in the plaintiff's name. In his evidence in cross-examination the defendant said:—

> "I did not get a power of attorney when I transferred the piece of land to her in 1929. It was only one acre. I wanted to have some property in her name. She was living with me and had borne me children. I sold that property in May 1937. I wanted money for travelling expenses".

It is clear that the transfer of the property to the defendant constituted a gift, and when the defendant sold the land in 1937 and put the money into his pocket, it was *prima facie* a fraudulent conversion. This piece of land does not, however, form the subject matter of this suit. Plaintiff's counsel informed the Court that the plaintiff could not trace the lot No. of the land in question. In any case the plaint was not issued until October 1937, when the land had passed into the hands of a purchaser for value, and was possibly irrecoverable. The fact, however, that the defendant admittedly made a settlement on the plaintiff in 1929 is relevant to a consideration of the circumstances in which he put the transfer of other lands into the name of the plaintiff in 1931, when the parties were still on friendly terms.

On the 11th July 1931 one Chan Yew Choy transferred to the plaintiff two pieces of land held under E.M.R. Nos. 553 and 554, in the Mukim of Gua, District of Kuala Lipis, and having an area of about 20 acres. The consideration was stated to be $2,000. In November of that same year the plaintiff went to visit her relations in Ceylon, and stayed there about 11 months. Just before going to Ceylon she gave the defendant a full power of attorney dated 2.11.31 (Exhibit 'C'). This power gave authority to sell the lands in question, but the plaintiff says that the object was to enable the defendant to get the rubber coupons, and generally manage the land. This power of attorney was not expressed to be irrevocable.

The plaintiff returned to Malaya towards the end of 1932, and continued to live with the defendant. At that time the defendant was carrying on the business of an auctioneer. For this purpose it was necessary for someone to guarantee him when he took out his yearly licence. A Chinese friend provided the guarantee in 1931 and also in 1932. At the beginning of 1933 however a different arrangement was made. The defendant was guaranteed by the plaintiff, and both parties deposited title deeds by way of security, the plaintiff depositing the two E.M.Rs. which are the subject matter of this action.

So far there is no controversy as to what took place. There is, however, a considerable conflict of evidence as to the circumstances of the transfer on the 11th July 1931. The plaintiff says that although the consideration was stated to be $2,000, the actual con-

sideration was $1,500 which she paid in cash out of her own savings. The defendant on the other hand says that the consideration was the release of a previous indebtedness to him by the transferor Chan Yew Choy. His evidence is supported by the evidence of Chan Yew Choy herself, and by a document (Exhibit 10) signed by the defendant and Chan Yew Choy indicating a settlement of accounts on the previous day, the 10th July 1931. As regards the plaintiff's story, I think it extremely unlikely that she would ever have had so large a sum as $1,500 in her possession. From the defendant's subsequent conduct it would appear that he always kept her rather short of money. If she earned any money by sewing, I have no doubt that she spent it on the children and for her own personal needs. I find therefore that the purchase consideration for the lands in question was provided by the defendant.

The substantial question arises, however, whether at the time of the transfer the defendant intended to make provision for the plaintiff, or whether there was a resulting trust in his favour. The general rule is that when property is transferred into the name of another party there is a resulting trust in favour of the person who provided the purchase money (see *Underhill* on Trusts, 8th editioin, page 158, Article 29). This presumption may be rebutted:—

(a) by evidence that the purchaser intended to benefit such other person; and

(b) by the relationship between the purchaser and such other person, i.e. if such other person was the lawful wife or child or some person to whom the purchaser stood in **loco parentis.**

The Court of Chancery in England extended the rule to the case of illegitimate children (see *Soar v. Foster*, 70 E.R. page 67). It is true that Page Wood V.C. *refused to extend* it to a person not legally married to the purchaser, but I do not think that so strict a rule which was laid down in 1858 would now be followed in England, and in any case I am satisfied that such a rule would be quite unsuitable to the Asiatic inhabitants of the Federated Malay States. I find, therefore, that the relationship of the parties in this case raises a presumption that that the transfer into the name of the plaintiff was intended as a settlement. This presumption is strengthened by the fact that the defendant had two years previously made a settlement of a small piece of land in the plaintiff's favour, thereby recognising a moral duty to the plaintiff.

The presumption of settlement can also be rebutted, and the defendant attempted to do so by alleging that he only had the land put into the plaintiff's name in order that she might be in a position to sign a guarantee for him as auctioneer. I have already pointed out that the land was not put to that use until 18 months later, and I reject this evidence as being highly improbable. I also reject Chan Yew Choy's statement that the defendant told her that the land was to be put in the plaintiff's name in connection with the defendant's business as auctioneer. I see no reason why she should have been interested to inquire, nor why after seven years she should be in a position to remember. She was completely mistaken in saying that the settlement of account (Exhibit 10) was signed after the date of the transfer, although this was a matter which directly affected her and which she might have been expected to remember. It is also to be observed that the defendant never stated in his own evidence that he had told Chan Yew Choy why he wanted the transfer into the plaintiff's name.

I find, therefore, that the two pieces of land in question were the property of the plaintiff from the time that they were transferred to her in July 1931. The plaintiff, as I have said, returned to Malaya at the end of 1932 and continued to live with the defendant until differences arose in 1935. At the end of April of that year the plaintiff left Bentong, where she had been living with the defendant, and went to stay with her brother in Kuala Lumpur. While she was there she revoked the power of attorney of 1931. The revocation is dated the 1st May, 1935. The defendant thereupon, either by himself or through the mediation of a mutual friend Ng Fook, induced her to return to Bentong and, in his own words, "come to a settlement". It was arranged that the defendant should pay the passages of the plaintiff and her four younger children to Ceylon and send her money for maintenance while in Ceylon. The defendant also says he gave her Rs. 500, but the plaintiff did not say so and was never cross-examined on the point. In return the plaintiff gave the defendant another power of attorney dated 14th May 1935 (Exhibit 'C'). This power of attorney is a full general power like Exhibit 'A', but unlike Exhibit 'A' is expressed to be irrevocable. Acting under this power of attorney the defendant in May 1936 transferred the lands to himself in consideration of the sum of $2,000, which admittedly was never paid. The object of the transfer was to enable the defendant to obtain an advance from a money-lender.

Now, at this point it will be desirable to examine more clearly how the parties have framed their cases. The plaintiff in paragraph 3 of the plaint alleges that she was the proprietress of the lands in question.

This I have found in her favour, although not for the reasons which she attempted to set up in her evidence. The defendant, on the other hand, argues that the property was his *ab initio,* because he paid the purchase money. He does not allege that he obtained the property by virtue of the arrangements come to in May 1935, when he obtained the irrevocable power of attorney. He submits that the power of attorney merely implemented pre-existing rights.

With regard to this power of attorney the plaintiff has attempted to prove that it was obtained from her by fraud, and that she only intended it to be used for the collection of the rubber coupons, and for the purpose of the management of the land. Whether this is so or not, I find that the plaintiff has failed to establish that she did not understand the power of attorney. Mr. Gartside and Ng Fook both gave evidence and satisfied me that she fully understood the effect of the power of attorney which she signed. It is, however, one thing for a person to sign a full power of attorney and quite another for her to dispossess herself of her property. A power of attorney is merely machinery for enabling an agent to carry out the terms of the principal's mandate. In itself it is only evidence that some mandate was given, and the actual mandate must be proved *aliunde.*

If, as the defendant alleges, the plaintiff was ready to sign anything he wanted in consideration of her being sent back to Ceylon and of the promise of future maintenance, it is difficult to see why he did not obtain a transfer of the lands in question. His excuse that he still wanted them in her name to be security for himself as auctioneer is hardly acceptable, first because at the time he was no longer an auctioneer but working as Mr. Gartside's clerk, and secondly because the land in the plaintiff's name would be of no use if the plaintiff were not present to sign the surety bond. There can I think be little doubt that if she had signed such a transfer it might have been set aside as an unconscionable bargain, as the plaintiff would be parting with the whole of her property and was never separately advised. The same observation would apply if the object of the power of attorney was in effect to deprive herself of her property, but these are academic considerations because that is not the defendant's case. He supports his action in transferring the land to himself for a consideration which was never paid on the ground that the land was always his, and on this issue he has failed. It is true that in some of the letters written by the plaintiff to the defendant from Ceylon it is arguable that she recognises the defendant's ownership of the land, but the only passages referred to are obscure, and even if they were perfectly clear, casual admissions made by her under a mistake of her legal rights could not possibly amount in law to a release of her property into the hands of the defendant.

It is also true that the plaint does not fully set out the plaintiff's real case, but I have taken into consideration the fact that the plaintiff is a poor woman who could not afford even to have her plaint drawn by a lawyer, and justice would scarcely be done by allowing technical objections to defeat her claims. She alleges that the land is hers, and asks for the transfer by the defendant to himself to be set aside on the ground that the power of attorney was fraudulently obtained. In my opinion it is unnecessary for me to decide whether or not the power of attorney was obtained by the exercise of undue influence or with an ulterior fraudulent motive. I am satisfied, however, that the execution of the transfer in pursuance of such a power of attorney was fraudulent. A trustee or mortgagee is not even allowed to purchase the trust or mortgaged property, still less to convert it to his own use without consideration, and an agent is certainly in no better a position.

The plaintiff is accordingly entitled to:—

(1) a declaration that the lands in question are the absolute property of the plaintiff;

(2) a declaration that the transfer of the 26th May 1936 in favour of the defendant is null and void;

(3) an order under section 240 of the Land Code directing the proper registering authority to cancel the memorial of such transfer;

(4) an Order upon the defendant to deliver up the issue copies of the E.M.Rs. to the plaintiff and an order that the indorsements upon such issue copies of the transfer to the defendant be cancelled;

(5) the costs of the suit.

From the above decision the defendant appealed.

Hastings for defendant—appellant.

Ramani for plaintiff—respondent.

Poyser, C.J. (F.M.S.)—I have read the judgment of Gordon-Smith J. I agree with it and have nothing to add.

McElwaine, C.J. (S.S.)—Whether *Soar v. Foster,* 4 Kay & J. 152 would or would not be held today to be too strict it is not necessary to decide. I would, however, observe that in *In re A Policy of the Scottish Equitable Life Assurance Company* (1902) 1 Ch. 282 there was no sort of obligation owing by Mr. Sanderson to Miss Stiles at the time the policy was taken out. There are several cases in which bonds to provide for

mistresses have been held to be valid—*Turner v. Vaughan* 2 Wills 339, 95 E.R. 845, *Nye v. Moseley* 6 B. & C. 133, *Re Vallance* 26 Ch. D. 353, *In re Abdy* (1895) 1 Ch. 455. These were not cases of resulting trusts, they depended upon whether the real consideration was future immorality. Bathurst J. in *Turner v. Vaughan (supra)* said "when a man is bound in honour and conscience, God forbid, that a Court of Law should say the contrary; and wherever it appears that the man is the seducer, the bond is good". Whether the same broadminded principle should not in equity defeat the theory of a resulting trust and be taken to indicate that the purchaser intended the conveyance to be a provision for a woman for whom in honour and conscience he ought to provide it is unnecessary now to decide because apart from this point there was evidence from which the learned trial Judge could properly find that a gift for the benefit of the plaintiff was intended.

In addition to the points mentioned by the trial Judge, the facts that a power of attorney was not taken until a substantial time had lapsed after the transfer and that the defendant said the transfer was made to the plaintiff "to keep some of the property for herself and find security for auctioneer's licence" though he afterwards corrected himself, support the view that a gift was intended. I agree that this appeal should be dismissed with costs.

Gordon-Smith, Ag. J.A.—This was an an appeal against the judgment of Terrell, Acting Chief Justice, whereby he had held that the Respondent was entitled to a declaration that certain lands were the absolute property of the Respondent and that a transfer of the 26th May, 1936, of such lands in favour of the Appellant was null and void, and with consequential directions.

The Respondent was not legally married to the Appellant but had lived with him as his mistress in Malaya since 1921 and had borne him several children.

In 1931 the Respondent had acquired 2 pieces of land held under E.M.R. Nos 553 and 554 and by the transfer, dated the 11th July 1931, these 2 pieces of land were put in the name of the Respondent and she became the registered proprietor.

Differences arose in 1935 and the Respondent returned to Ceylon with the children on the understanding that the Appellant should send her money for her maintenance and that of the children.

In 1931 the Respondent had given the Appellant a Power of Attorney which, on these differences arising, she had formally revoked on the 1st May, 1935.

On a settlement being come to, the Respondent gave the Appellant a further Power of Attorney, dated the 14th May, 1935, expressed to be irrevocable, and under this power the Respondent executed a transfer of the 2 pieces of land to himself and became the registered proprietor.

On the evidence before him the learned trial Judge found that although there was nothing fraudulent in the manner in which this Power of Attorney had been obtained, yet the exercise of the power thereunder in transferring the land in question into his own name was fraudulent.

The law as to resulting trusts of this nature may be conveniently summarized from *Underhill* on Trusts (8th Edition) page 158, Article 29—

> "(1) When real or personal property is vested in a purchaser....a resulting trust will be presumed in favour of the person proved....to have paid the purchase money in the character of purchaser.
>
> (2) This presumption may be rebutted
>
> (a) by parol or other evidence that the purchaser intended to benefit the others; or
>
> (b) by the fact that the person in whom the property was vested was the lawful wife, or child of the purchaser....
>
> In any of these cases a **prima facie** (but rebuttable) presumption will arise that the purchaser intended the ostensible grantee or grantees to take beneficially".

It is to be noted that in his judgment the learned trial Judge in quoting these paragraphs (a) and (b) used the conjunctive "and" which is incorrect and it should be "or" and the two paragraphs are disjunctive.

The argument for the Appellant was that there was a resulting trust in his favour and that this presumption had not been rebutted by the Respondent under either paragraph because (a) there was no evidence that the purchaser (the Appellant) intended to benefit the Respondent and because (b) the Respondent was not his lawful wife. In effect, the learned trial Judge had held that the presumption of a resulting trust was, in fact and on the evidence before him, rebutted under both paragraphs.

There was the evidence of the Appellant himself of an earlier and similar transaction in 1929 in respect of another small piece of land which the learned trial Judge held to have constituted a clear gift to the Respondent as, to quote the Appellant, "I wanted to have some property in her name. She was living with me and had borne me children". I agree as to this and on this and the other evidence before him I am of the opinion that the learned trial Judge was amply

justified in finding that in effecting the subsequent transfer into the name of the Respondent, the Appellant also at that time intended it to be for her benefit. There is no need for me to detail all this evidence or the evidence of the Appellant *per contra* as it was a question of fact for the learned trial Judge but even on the record itself and without having seen or heard the Appellant himself, it is abundantly clear that very little reliance could be placed on the Appellant's testimony in regard to this and his subsequent transactions with the land.

For the above reasons therefore, I am of the opinion that there was ample evidence to rebut the presumption of a resulting trust in favour of the Appellant and that such evidence established the proposition contained in paragraph (a) before set out and that therefore not only was the Respondent the legal and registered proprietor of the land but that she was also beneficially entitled to it as from the date she became such registered proprietor.

Having obtained the further Power of Attorney in May 1935, a year later, namely in May 1936, and under this power, the Appellant transfers the land into his own name, thereby dispossessing the Respondent of her property. This, the learned trial Judge found to be a fraudulent dispossession, and on the evidence before him, he was justified in coming to such conclusion.

The learned trial Judge also appears to have considered the position of the Respondent under paragraph (b) quoted above and found that the relationship of the parties raised a presumption that the transfer into the name of the Plaintiff (Respondent) was intended as a settlement.

I agree that this may be so but, strictly speaking, I consider this as evidence to support the rebuttal under paragraph (a) above.

In *Soar v. Foster,* 70 E.R. p.67 the Court refused to extend the principle existing in favour of a lawful wife or child to an unlawful wife although it has been extended in favour of a grandchild when the father was dead, and of an illegitimate child, on the whole the Courts appear to have been against extending the presumption of an advance or settlement.

The learned trial Judge, however, stated "but I do not think that so strict a rule which was laid down in 1858 would now be followed in England, and in any case I am satisfied that such a rule would be quite unsuitable to the Asiatic inhabitants of the F.M.S." While I am inclined to agree with the learned trial Judge in this remark, it was unnecessary to decide the point as to whether, out here it was desirable to extend the principle to a mistress, and I regard such remarks as *obiter dicta.* I refrain, therefore, from expressing a definite opinion on this second paragraph particularly as the Appellant already had a legal wife living in Ceylon.

For the reasons, however, that I have set out earlier and on the other ground, I am of the opinion that the appeal should be dismissed with costs.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

MURRAY-AYNSLEY, J.

December 12, 1938.

GAN BENG - - - Appellant

v.

PUBLIC PROSECUTOR - - Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 93 of 1938]

(Tapah Criminal Case No. 835/38)

Penal Code (Cap. 45) s. 406—Breach of trust—meaning of "trust"—includes bailments.

The facts, as set out in the judgment, were as follows:—

The complainant lent the Appellant a bicycle, the latter promising to return it in two hours. Ten days later the complainant received a letter from the Appellant, and afterwards met the Appellant but the bicycle was never returned. Proceedings were taken and the bicycle was only produced by the Appellant when the present case came on for hearing before the Magistrate. It then had a new seat, rear mud-guard and fork. The defence at the Court below was that the Appellant did not misappropriate it.

Held, that the appellant was rightly convicted. **Ng Chye Giat v. Rex,** 7 M.L.J. 126 dissented from.

Hum Yam Teh for Appellant.

T. V. A. Brodie, Deputy Public Prosecutor, for Respondent.

Murray-Aynsley, J.—This is an appeal against conviction under Section 406 Penal Code for fraudulent breach of trust within the meaning of Section 405.

The facts are exceedingly simple.

[His Lordship here stated the facts as extracted, *supra*].

On the facts there was clearly not only ample but overwhelming evidence to support the finding of fact of the Magistrate, who convicted the Appellant. Counsel for the Appellant was content to attack this finding of fact but the Deputy Public Prosecutor with great propriety referred me to a case reported in 7 Malayan Law Journal p. 126 *Ng Chye Giat* v. *Rex,* in which the learned Judge, relying on a case reported in Gour held that the word "entrusted" is limited to trusts properly so called. The